No. 10035.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

B. F. Goodrich Company, a corporation,

Appellant,

vs.

United States of America,

Appellee.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

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At the argument of this case, the Court directed counsel for the United States to file a further brief setting forth the additional arguments and authorities which counsel was then presenting in support of the decision below. This brief is accordingly submitted.

I.

The Taxing Provisions of Section 9 (a) of the Agricultural Adjustment Act Having Been Declared Unconstitutional and Void, the Provisions of the Proviso Clause of Section 9 (a) Are Likewise Void and Appellant Can Take No Benefit Under Them.

The manufacturers' excise tax, imposed by Section 602 (1) of the Revenue Act of 1932, recovery of which is sought in this action, is a valid and constitutional tax. The Agricultural Adjustment Act taxes, both the tax imposed as a processing tax (by section 9 (a)) and the floor

stocks taxes (imposed by section 16 (a)) were unconstitutional. *United States v. Butler,* 297 U. S. 1. Appellant attempts here to claim a credit against valid manufacturers' excise taxes by virtue of and pursuant to a provision of an act which has been declared unconstitutional. Moreover the recovery is sought not by the taxpayer, who paid the manufacturers' excise taxes,[1] but by another, the B. F. Goodrich Company, and upon grounds not set up in appellant's claims for refund.

In the court below this action was defended upon the ground, among others, that neither the taxpayer nor the B. F. Goodrich Company, appellant, could recover valid manufacturers' excise taxes pursuant to a provision in some other act which has been held unconstitutional. We defend this action here and the decision below upon the same ground, as we may, in accordance with the established principle that "a respondent or an appellee may urge any matter appearing in the record in support of a judgment * * *". *Le Tulle v. Scofield,* 308 U. S. 415, 421. See also *Ryerson v. United States,* 312 U. S. 405, 408; *Helvering v. Lerner Stores Co.,* 314 U. S. 463. In the latter case the Supreme Court pertinently observed (pp. 466-467):

> "The Board and the Circuit Court of Appeals ruled adversely to respondent on these constitutional issues. Respondent filed no cross petition for certiorari. Yet a respondent, without filing a cross petition, may urge in support of the judgment under review grounds rejected by the court below." (Citing several cases.)

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[1]By "taxpayer" is meant, in this brief, the Pacific Goodrich Rubber Company. Its tax liability is involved, and it paid the taxes for which this suit was brought. It was the taxpayer. The B. F. Goodrich Company was not the taxpayer and it will be referred to herein as the "appellant".

The trouble with appellant's case is that it is claiming against or in the computation of a valid manufacturers' excise tax a benefit or a credit or an allowance (call it what you will) prescribed by an unconstitutional statute. The real grievance of the *taxpayer* is that unconstitutional floor stocks taxes were exacted from it under the Agricultural Adjustment Act. That is its grievance. (Of course, it may have passed those taxes on to its customers, in which event the taxpayer would have no actionable grievance.) But appellant does not assert that grievance nor sue for the recovery of the taxpayer's Agricultural Adjustment Act taxes. Appellant sues for manufacturers' excise taxes and claims a benefit against those taxes under and by virtue of a provision of an unconstitutional act. This it may not do, for it is settled that the declaration by the Court of the unconstitutionality of a statute obliterates the legislative action as if the statute had never existed.

An early leading case on this is *Norton v. Shelby County,* 118 U. S. 425. There the Supreme Court said (p. 442):

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The case of *Chicago Ind. & L. Ry. Co. v. Hackett,* 228 U. S. 559, is likewise pertinent. In that case the Supreme Court referred to its former decision that the act of Congress of June 11, 1906 (the first Federal employer's liability act), was unconstitutional and that the provisions

of that act were so interblended in the statute that they were incapable of separation. It then said (p. 566):

> "That Act was, therefore, as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."

The opinion then concluded (p. 567):

> "* * * a void statute, * * * was not law for any purpose."

So, also, in *Peters v. Broward,* 222 U. S. 483, the Supreme Court said (p. 495):

> "* * * the invalidity of the act disposes of every right which might otherwise proceed from it."

Cooley's Constitutional Limitations, 8th Ed., Vol. I, p. 382, states:

> "Where a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built upon it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be treated as if it had never, at any time, been possessed of any legal force."

An analogous case is *Beckers v. United States,* 42 Fed. (2d) 300 (C. Cls.), certiorari denied 282 U. S. 882, where a taxpayer claimed certain rights under the provisions of an unconstitutional statute. The controversy concerned the taxpayer's right to a certain type of cost

basis on the sale of stock. This cost basis had been provided for by provisions of the Revenue Acts of 1916 and 1918, which provisions had declared *stock dividends* to be taxable as income, and had later been declared unconstitutional. (*Eisner v. Macomber,* 252 U. S. 189.) The Court in denying the taxpayer's contention cited *Norton v. Shelby County, supra,* and then concluded (p. 303):

> "In view of this record it is difficult to perceive wherein under the revenue acts plaintiff may claim a deduction from the sales price of a value fixed by the terms of an act which the Supreme Court held to be unconstitutional."

Thus we submit that the taxpayer and appellant have *misconceived their remedy;* they should have filed claims for refund of the unconstitutional floor stocks taxes, aggregating $34,648.08, which taxpayer paid in 1933 and upon denial of such claims, *if* denied and not allowed *and if* taxpayer had absorbed the floor stocks taxes and not passed them on, then taxpayer[2] should have followed the established procedure for recovering the floor stocks taxes. Venue for such recovery would lie in the United States Court of Claims or in the appropriate United States District Court, and not with the Processing Tax Board. *Anniston Mfg. Co. v. Davis,* 301 U. S. 337.

But one possible objection can be suggested to what has just been said, namely, that perhaps the credit provisions of Title I of the unconstitutional Agricultural Adjustment Act were *severable* from the provisions of Title I imposing processing taxes (section 9 (a)) and floor stocks taxes (section 16 (a)), particularly in view of section 14

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[2]See in this connection Section 2074, Revised Code of Delaware, 1935 (Chap. 65, Sec. 42).

of Title I of the Agricultural Adjustment Act providing that "If any provision of this title is declared unconstitutional * * * or invalid, the validity of the remainder of this title * * * shall not be affected thereby".

The separability clause has some application, viz., to Part 1 of Title I, involving Cotton Option Contracts, and to the interstate market provisions later provided by amendment,[3] but not to the *taxing scheme* of Part 2, all of which went out under the *Butler* case, *supra.*

Obviously the credit provision is a proviso to or limitation upon section 9 (a) imposing a processing tax. Significantly there is no credit provision hooked to section 16, which section alone imposes the floor stocks taxes. Both the processing tax imposed by section 9 (a) and the floor stocks taxes provided by section 16 were declared and held unconstitutional by *United States v. Butler, supra.* Thus the entire taxing provisions were struck from the statute. When they went, we submit that nothing of them remained, certainly no part of the floor stocks tax provisions for they carried no credit proviso, and similarly with the collapse of the processing tax, provided by section 9 (a), the credit provided in the case of *true processing taxes* likewise collapsed. A severability clause, the Supreme Court has said, is "but an aid to interpretation and not an inexorable command"; it establishes a presumption of divisibility; "and this presumption must be overcome by considerations that make evident the inseparabil-

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[3]*Edwards v. United States,* 91 Fed. (2d) 767 (C. C. A. 9th).

ity of the provisions *or the clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part. Williams v. Standard Oil Co.,* 278 U. S. 235, 241-242."

Under either presumption, however (that of indivisibility or that of severability), the Supreme Court has said, "the determination, in the end, is reached by applying the same test—namely, What was the intent of the lawmakers?" *Carter v. Carter Coal Co.,* 298 U. S. 238, 312.

The controlling question is whether Congress would have passed *the proviso clause* of section 9 (a) of the Agricultural Adjustment Act *if* the rest of section 9 (a), imposing the processing taxes, had not been passed. We submit to Your Honors that if Congress had known that it was not levying a tax, *it would never have provided a credit or benefit on account of a tax which it did not impose.*

Congress thought it had imposed a processing tax and, having done so, it added as a proviso to the section the provision for crediting the weight of processed cotton "on which a *processing tax* has been paid" against the weight of the finished article (tires) upon which a manufacturers' excise tax must be paid. (Italics ours.) Thus the credit provision is inextricably bound up with the processing tax provision. The credit or benefit or allowance, if any, is absolutely dependent upon and *assumes a valid collection of "processing" tax.*

A clearer case of inseparability could not be imagined. Certainly Congress would not have enacted the credit

provisions if it had known that the tax which it sought to impose by the Agricultural Adjustment Act could not legally be collected. Their reaction would have been—"No tax, No credit".

Carter v. Carter Coal Co., 298 U. S. 238, is an analogous case. The Supreme Court held that the price fixing provisions of section 4 of the Bituminous Coal Conservation Act of 1935 were so interwoven with the invalid labor-regulation provisions of the *same section* of the act that, the latter provisions being unconstitutional, the former were also invalid. In that act, as in this, there was a so-called separability clause, the clause being section 15 of that act. But, notwithstanding such provision, the Court there said (p. 316) that the price fixing provisions were so related to and dependent upon the labor provisions "as to make it clearly probable that the latter being held bad, the former would not have been passed. The fall of the latter, therefore, carries down with it the former. *International Textbook Co. v. Pigg,* 217 U. S. 91, 112-113."

Thus, when it be recognized that the credit proviso of section 9 (a) is inseparable from the rest of section 9 (a), it is clear that the appellant is claiming under an unconstitutional statute a benefit or a credit or an allowance (call it what you will) against a perfectly valid manufacturers' excise tax. This *it* cannot do. *Taxpayer* owed manufacturers' excise taxes in the full amount; it did not owe floor stocks taxes. It should have filed claims for refund of its $34,648.08 of floor stocks taxes—and perhaps it has done this—and then, *if* the taxpayer itself absorbed the floor stocks taxes and did not pass them on, an action for the proper relief. Neither it nor the appellant may maintain any such action as this.

II.

On the Merits, and Even if the Proviso Clause of Section 9 (a) of the Agricultural Adjustment Act Be Deemed Separable From the Taxing Provisions of Section 9 (a), the Taxpayer Could Not Credit the Weight of Cotton on Which It Paid Floor Stocks Taxes Under Section 16 Against the Weight of Tires Subject to Manufactures' Excise Tax Under Section 602, of the Revenue Act of 1932.

The District Court held against the Government on this issue [R. 98-99], but we believe that the decision should have been for us. If this Court agrees with the Government then the decision below must, in any event, be affirmed. Two observations seem appropriate with respect to the issue:

(1) Section 9 (a) of the Agricultural Adjustment Act levied a processing tax (later declared to be unconstitutional) "upon the first domestic processing of the commodity". Section 9 (d) (2) *defined,* in the case of cotton, the term "processing" *as meaning* "the spinning, manufacturing, or other processing (except ginning) of cotton;" * * *. The section was prospective in its operation.

The proviso clause of section 9 (a) extended the credit or benefit, in the situation set forth, where "*a processing tax* has been paid". (Italics ours.)

A floor stocks tax (under section 16), however, is *not* a processing tax within the statutory definition, for the latter tax is only upon "the spinning, manufacturing, or

other processing (except ginning) of cotton". A floor stocks tax may be a kind of companion tax, a second cousin to a processing tax, but it is not a processing tax. The statutory definition is clear and *must control. Cf. Fox v. Standard Oil Co.,* 294 U. S. 87, 95-96, where a West Virginia statute defined "store" as used in its taxing act.

> "* * * we must apply the statute as we find it, leaving to Congress the correction of asserted inconsistencies and inequalities in its operation."
>
> *McClain v. Commissioner,* 311 U. S. 527, 530.

Similarly in *Scaife Co. v. Commissioner,* 314 U. S. 459, the Supreme Court said (pp. 462-463):

> "We are dealing with an Act of Congress. * * * If we were to grant petitioner the extension which it asks, we should be performing a legislative or administrative, not a judicial, function."

See, also, *Crooks v. Harrelson,* 282 U. S. 55, 60.

A tax on "the first domestic processing", as defined by section 9 (a), is not a tax on something already manufactured and standing on the floor, which contains already processed materials. And *vice versa.* Hence the credit provided under section 9 (a) in instances where a "processing tax has been paid" is not a provision for a credit or benefit or allowance on account of floor stocks taxes paid.

(2) Moreover, and significantly, the Revenue Act of 1936 established a specific procedure for the recovery of

"processing taxes", and that procedure is different from the procedure for recovering floor stocks taxes. Claims for refund must be filed for each, but *action* to recover "processing tax as defined * * * under the Agricultural Adjustment Act" (section 906, Revenue Act of 1936) lies only before the Processing Tax Board, whereas the venue for the recovery of floor stocks taxes is the United States District Court or the Court of Claims (Sec. 905).

Thus Congress has unmistakably reiterated that by "processing taxes" under the Agricultural Adjustment Act it meant one thing, and by "floor stocks" taxes it meant another.

And the Supreme Court recognized this distinction in *Anniston Mfg. Co. v. Davis,* 301 U. S. 337. Thus under this ruling of our Supreme Court the term "processing tax" as used in the Agricultural Adjustment Act does not include the tax on "floor stocks". This ought to be conclusive. Thus the credit or deduction or benefit granted by section 9 (a) on account of the cotton "on which a processing tax has been paid" could never extend a credit or deduction or allowance for cotton on which "floor stocks" taxes have been paid.

III.

The Claims for Refund Were Not Sufficient.

Without repeating them here, the Government incorporates by reference the additional arguments and defenses to this action which are set forth in its original printed brief, particularly in sections II and III of the argument of that brief.

Supplementing what was there said, we point out that not until many years after taxpayer had paid the "manufacturers' excise taxes", now sued for, did the appellant make any representation that it had succeeded to the taxpayer's rights by anything other than the attempted specific assignments of June 30, 1934 [Ex. A, R. 191-193] and of August 14, 1935 [Ex. B, R. 194-196]. Even appellant's first amended petition [R. 49-78] filed February 5, 1940, on the very eve of trial, said nothing about a claim to taxpayer's rights by operation of law *as a result of dissolution of the taxpayer.* The amended petition thus filed (more than five years after payment of the tax) alleged [R. 51] title by operation of law, pursuant to a distribution in kind to appellant as the sole owner of all of taxpayer's issued capital stock and set up the 1934 and 1935 "assignments", so-called, as evidence of that distribution. At the trial it developed that the taxpayer had been dissolved, December 21, 1934. [Ex. J, R. 234-235.] Of course, no claim for refund ever set up appellant's claim to title by operation of law upon and by virtue of a dissolution of the taxpayer, a wholly owned subsidiary. Recovery was thus attempted by the appellant upon

grounds never set up in a timely or in any claim for refund which it had filed. *Cf.* cases cited footnote 14, p. 28, of the Government's original brief. See, also, *Pelham Hall Co. v. Carney,* 111 Fed. (2d) 944, 949 (C. C. A. 1st).

Conclusion.

The District Court did not err in holding that appellant was not entitled to recover in this action. The judgment below should be affirmed.

Respectfully submitted,

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